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No. 04-480

IN THE

Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS INC., *ET AL.*,
Petitioners,

v.

GROKSTER, LTD., *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The Washington Legal Foundation (WLF)[1] is a non-profit public interest law and policy center with supporters nationwide. WLF devotes a significant portion of its resources to promoting economic liberty, free enterprise principles, and a limited and accountable government. WLF regularly appears as amicus curiae in the Supreme Court and lower federal courts in cases raising important statutory and constitutional issues.

In addition, WLF's Legal Studies Division publishes articles and sponsors briefings on a variety of legal topics, including those that are implicated in this case. *See, e.g.*, David Young, *Congress Modifies Copyright Protections For The Digital Age* (WLF Legal Backgrounder, Feb. 19, 1999); Brian S. Kelly, *Oil And Water, Or Vinaigrette?: "Open Source" Software May Pose Legal Risks For Commercial Users* (WLF Legal Backgrounder, June 6, 2003); *Copyrights in Cyberspace: Are Intellectual Property Rights Obsolete in the Digital Economy?* (WLF Media Briefing, March 28, 2001).

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae state than no counsel for a party authored this brief in whole or in part, and that no person or entity, other than amicus Washington Legal Foundation and their counsel, contributed monetarily to the preparation and submission of this brief. By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

WLF submits that the issue presented in this case is of the utmost public interest and importance in the area of copyright law in this digital age. Because of the confusion of the law in this area, the Court should grant the petition.

REASONS FOR GRANTING THE PETITION

The immediate interests of the Petitioners are well expressed in their petition and will not be elaborated upon further here. However, we bring to the Court's attention what Amicus regards as the additional, profound and immediate concerns that we believe should be addressed by the Court at this time. At the root of these additional concerns is the extraordinary tension that the advent of this new Internet technology brings between the interests of legislation under Article I, Section 8, Clause 8 of the Constitution (the Copyright Clause) and the speech interests articulated in the First Amendment.

1. This Court has long been reluctant to expand the traditional bounds of copyright protection without specific congressional action. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984). This reluctance has been pronounced when "major technological innovations alter the market for copyrighted materials." *Id.* However, in cases involving the Internet, a technology that allows instantaneous information publication to a world

audience, this Court can provide guidance with respect to the dimensions and breadth of copyright issues.[2]

The need for this Court's involvement is more pronounced when free speech issues are implicated, such as in this case. This Court has routinely held that different aspects of technology can justify different applications of the First Amendment. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 557 (1975). In *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), a technology-centric approach for the Internet was considered when determining the First Amendment restrictions of a proposed obscenity statute. 521 U.S. at 868-70. Although in *Reno* it was ultimately held that the Internet does not possess the factors that require a different technological analysis, the approach itself was utilized and evaluated.[3]

As this Court has recently noted, the changing technology of the Internet necessarily plays a role in any

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[2] See *Sony*, 464 U.S. 417, 457 (Blackmun, J., dissenting)(noting that the Court should not necessarily be bound to the "tradition" of "consistent deference to Congress" with respect to copyright law).

[3] The Court's determination in *Reno* that the Internet does not possess any of the traditional factors requiring a special application of the First Amendment (such as historical government regulation, scarcity of the medium, or invasive nature of the medium) might need to be reexamined given how the Internet has developed in the years since that decision. *See Ashcroft v. American Civil Liberties Union*, 124 S. Ct. 2738, 2794-95 (2004) (noting technological developments of the Internet since 1999 and their potential application to a First Amendment analysis).

type of judicial analysis, especially a First Amendment analysis. *Ashcroft v. American Civil Liberties Union*, 124 S. Ct. 2783, 2794-95 (2004). Applying free speech principles on Internet material to the application of the copyright laws might require the application of technology-specific facts. It is therefore appropriate that the Court consider the differences found in applying the copyright laws to the Internet, especially when, as here, there are First Amendment issues as to the very nature of the scope of the copyright laws that need to be considered.

2. It is hardly likely that, 217 years ago, the framers could have conceived of communications so unordered, universal and immediate as those enabled by computers and Internet technology. In the well-ordered, hard copy and time defined communications of the eighteenth and nineteenth centuries, the purpose of promoting the writings of authors by creating "exclusive Right" was secured with relative ease. That this Copyright Clause monopoly of interest would modify the speech freedoms of the First Amendment was clearly an accepted balancing of interests of individuals and the nation. How that balance is to be regarded in this twenty-first century is plainly the most fundamental issue raised by the instant case. This court has not spoken directly to this extraordinary problem, even though its prior writings have clearly anticipated the need to do so.

Nor will it be satisfactory simply to leave the issue to later legislation. It is both too late to do so and the constitutional slate on which such legislation may be

written is already occupied by serious conflicts in Constitutional thinking. And, we are dealing with a "field" that partakes of no time for the deliberate consideration that the last two centuries permitted. Internet communication has created instant intercourse and has so thoroughly globalized the movement of "writings" as to suggest that the nation needs some further instruction from the Court in the balancing of an author's Copyright Clause interest and the nation's First Amendment interests. The instant case presents an ideal setting of the issue on which the Court can write, as unique and unchartered as the course may be.

The Copyright Clause/First Amendment issue in the present context has been anticipated by this Court's consideration of *Eldred v. Ashcroft*, 537 U.S. 186, 218-21 (2003). While the setting there was quite different, the Court noted the absence of the development of this problematic subject. As Justice Breyer presciently notes:

> Nor does it intrude upon congressional authority to consider rationality in light of the expressive values underlying the Copyright Clause, related as it is to the First Amendment, and given the constitutional importance of correctly drawing the relevant Clause/Amendment boundary.

Eldred, 537 U.S. at 264 (Breyer, J., dissenting). Clearly anticipating just the kind of issue raised by the instant case, Justice Breyer noted the "vigilance" that the Court

must exercise in determining the "outer boundaries" of the Clause in its relationship to the Amendment:

> And that vigilance is all the more necessary in a new Century that will see intellectual property rights and the forms of expression that underlie them play an ever more important role in the Nation's economy and the lives of its citizens.

Id. at 264. The instant case captures ideally all of the components about which the needed "vigilance" was addressed.

3. This Court's prior decisions, particularly *Eldred* and *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), have left unsecured the public versus the authors' interests in creative written products. The absence of this instruction has itself enabled the conflict that clearly exists between the Ninth and Seventh Circuits in *Metro-Goldwyn-Mayer Studios Inc., et al. v. Grokster, Ltd., et al.*, 380 F.3d 1154 (9th Cir. 2004) and *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1069 (2004). While historically one might have awaited the further maturation of the issues so presented, the Internet does not suggest the application of historical patience.

In both the Seventh and the Ninth Circuit opinions, this Court's prior determination in *Sony* was considered to be the primary guidance. Yet, the two Circuits reached nearly opposite results. We believe that this conundrum is the product of a precedent poorly suited to

the unique Internet setting. *Sony* involved hardware, not primarily the "services" that characterize the instant case. *Sony* involved an arguably recreational infringement setting that could be described as a "living room," with the copyright violations neatly confined to the household.

In the *Sony* setting, the seeming extension of a fair use doctrine appeared reasonably to balance the Copyright Clause/First Amendment interests. But the setting of this case is so notably different as to suggest that little of the *Sony* logic path may be applied. Here, we do not have a physical instrument such as a video recorder to tie content and functioning of which can be, by nature, confined and traced.

Here, we have the ubiquitous nature of the Internet in giving recreational users both inbound and outbound capabilities that were no part of *Sony*. And here, we have a service committed to facilitating this use nearly all of which is plainly intended to access copyrighted information. We suggest that the lines drawn in *Sony* have little meaningful application to the technology that is at issue in this case. We believe that the Court should make a fresh inquiry into the Copyright Clause/First Amendment boundaries in the context of the unique qualities of the Internet.

4. One of the difficulties raised by the technology at issue in this case is its ability to convey information beyond copyrighted music files. Peer-to-peer file sharing systems can be used to transfer a wide variety of files, containing a wide variety of information (both

copyrighted and in the public domain). This Court must consider the effects of the application of copyright law to this technology with any ensuing potential restraints on free speech. For example, the widespread use of the peer-to-peer technology combined with its access to millions of Internet uses raises the issue of whether information made available by that technology is available to the public. If the technology is deemed to be a disclosure to the public, the entire range of free speech issues involving information disclosure must be considered.

For example, in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the Court held that federal wiretap laws prohibiting the public disclosure of illegally obtained information violated the First Amendment. *Id.* at 535. Despite the strong interest prevalent in private communications, this Court concluded that "[t]he enforcement of [the statutes at issue] . . . implicates the core purposes of the First Amendment because it imposes sanctions on the publication of truthful information of public concern." *Id.* at 533. Thus, the "privacy concerns give way when balanced against the interest in publishing matters of public importance." *Id.* at 534.

From a technology perspective, what happens when the peer-to-peer file sharing system is used to exchange information "of public concern," even if that information was obtained illicitly? A decision that the system imposes secondary liability for copyright infringement raises the spectre of having to police what

type of information is used by the system, and risk having every user of the system subject to scrutiny as to whether its information is in the public domain or copyrighted. Moreover, what happens when the system is used to exchange information that may be copyrighted but nonetheless is "of public concern?" If a prohibition on enjoining the release of illegally obtained phone conversations violates the First Amendment, wouldn't the same be true of imposing secondary liability on the use of a technological system that allows the transmission of such information?

At the same time, given that the prevailing use of the peer-to-peer system appears to relate to distributing copyrighted material, deciding the particular balance between the First Amendment and secondary copyright liability on an individual case-by-case basis might be appropriate. Otherwise, courts might risk turning a "blind eye" to blatant copyright infringement, as alleged by Petitioners yet dismissed by the Ninth Circuit.

These considerations highlight the fact that publication and distribution of information on the Internet, particularly by technological systems that allow the transmission and reception of both proprietary and non-proprietary information, and the transmission and reception of both private and public information, raises issues that ought to be considered by this Court. Seemingly regular copyright infringement issues can become tainted with First Amendment overtones when the Internet is used as the technological medium.

CONCLUSION

For the foregoing reasons and those presented by the Petitioner, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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